

DATE: December 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-06095

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Department Counsel

FOR APPLICANT

Edward O. Lear, Attorney At Law

SYNOPSIS

The Applicant's history of security violations that occurred between 1997 to August 8, 2000, resulting in a criminal prosecution and conviction for violation of Title 18, United States Code, Section 1924(a), coupled with his significant foreign family ties, and poor personal conduct, has not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

STATEMENT OF THE CASE

On October 28, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on December 15, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on June 28, 2006. A notice of hearing was issued on August 2, 2006, scheduling the hearing for August 30, 2006. At the hearing the Government presented sixteen exhibits. The Applicant presented one exhibit, consisting of thirteen enclosures, and called one witness to testify. He also testified on his own behalf. The official transcript (Tr.) was received on September 18, 2006.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, and the documents. The Applicant is 45 years of age, and married. He holds a Master's Degree in Engineering. He is employed as a Systems Engineer by a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline K - Security Violations). The Government alleges that the Applicant's noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

The Applicant was employed with a defense contractor from May 31, 1996, to November 2, 1997. During that period he held a DoD security clearance and worked with classified information on a daily basis. One of his assignments was to create a document referred to as a viewgraph. This viewgraph was classified at the Secret level and contained classified information. It was clearly stamped "Secret." The Applicant knowingly and improperly transported this viewgraph to his private residence, without authorization, in about November 1997, in violation of company rules, procedures and guidelines and in violation of paragraphs 5-100, 5- 400, 4- 401, and 5- 403 of DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), January 1995. (See Government Exhibit 8).

The Applicant explained that during the period from May 1996 through November 1997, he worked between 15-16 hours day. He can only attribute his misconduct to carelessness. He believes he accidentally, and without his knowledge, removed the classified viewgraph from his place of employment and took it to his residence.

Several years later, in February 2000, when the Applicant came upon the classified materials at his place of residence, he failed to notify the appropriate authorities. This action was in violation of paragraphs 1-302 and 5-100 of DoD 5220.22M National Industrial Security Program Operating Manual (NISPOM), January 1995.

From about 1997 to August 8, 2000, the classified viewgraph was stored at the Applicant's residence. The Applicant knowingly and improperly stored classified information at his private residence without authorization in violation of company rules, procedures and guidelines and in violation of paragraphs 5-100 and 5-303 of DoD 5220.22-M, National Industrial Security Program Operating anual (NISPOM), January 1995. (See Government Exhibit 8).

In November 2000, during an interview with a potential employer for a new position with a defense contractor, the Applicant brought this classified viewgraph to the interview and presented it to the interviewer as proof that he was capable of working on the project. By doing so, the Applicant knowingly disclosed classified information to an unauthorized person by presenting classified information that was improperly removed from his place of employment without authorization, in violation of paragraphs 5-100, 5-500, 5-509, and 5-511 of DoD 5220.22-M, National Industrial Security Program Operating Manual (NISPOM), January 1995. The interviewer recognized the classification on the viewgraph, realized that he had no authority to view the document, and turned it over to investigative authorities. The Applicant was investigated by the FBI, his home was searched and five copies of the viewgraph were discovered. The Applicant subsequently resigned from his employment position with the defense contractor. (See Government Exhibit 8 and Tr. p. 70).

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant engaged in criminal activity that creates doubt about an individual's judgment, reliability and trustworthiness.

As a result of the security violation discussed above, in 2002, the Applicant was charged by the United States Attorney's Office of the Unauthorized Removal and Retention of a Classified Document, in violation of Title 18, United States Code, Section 1924(a). He entered a plea agreement, pled guilty to one count, was convicted and fined \$500.00. (See Government Exhibits 2, 3,4, 5 and 16).

Paragraph 3 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence that could result in the compromise of classified information.

The Applicant's ten year old daughter was born in the United States but attends public school in South Korea and resides there. It is presumed that she is also a citizen of South Korea. The Applicant's sister is also a citizen and resident of South Korea. The Applicant traveled to South Korea to visit his daughter at least in February 1994, from October 1998 to November 1998, December 1999 to January 2000, December 2000 to January 2001, and in December 2001 to January 2002. The Applicant's mother, who is a naturalized citizen of the United States, is currently living in South Korea taking care of the Applicant's sister's new baby. The Applicant is very close to his daughter. (Tr. p.104). He sends about \$1,050.00 per month to his sister and ex-wife. His sister gets \$50.00 and his ex-wife gets \$1,000.00 to take care of

the Applicant's daughter. He usually travels to South Korea during the Christmas season and sometimes in the summer.

Paragraph 4 (Guideline F - Financial Considerations). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he is financially overextended and is at risk of engaging in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

During the period from 1997 until 2002, the Applicant completed \$253,776.00 in casino transactions. (See Government Exhibit 7). The Applicant explained that his traumatic divorce in 1998, subsequent loneliness and related emotional difficulties in 2000-2001 caused him to be extremely depressed and resulted in him spending time gambling excessively. He obtained the monies to gamble from his salary and his stock. (Tr. p. 109). Although he does not believe that he gambled as much as \$253,776.00, the Treasury Finance Center Report indicates that he did. His excessive gambling continued until he met his second wife in April 2001. The Applicant is now happily remarried and in a stable relationship. His new wife is expecting a baby boy in December. They have traveled to Las Vegas on one occasion to vacation and they did some gambling. However, his excessive gambling habit has ceased.

Paragraph 5 (Guideline E - Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because his conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

The Applicant's security violations, criminal conduct, gambling habit and poor personal conduct, indicates poor judgment, unreliability and untrustworthiness.

Mitigation.

The Applicant's wife testified that the Applicant no longer gambles and that he is an honest, responsible man of good moral character. (Tr. pp. 120-124).

Thirteen letters of recommendation submitted on behalf of the Applicant by professional colleagues and friends indicate that the Applicant is an honest man of good character. He is considered trustworthy and a valuable asset to the company. (See Applicant's Exhibit A).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline K (Security Violations)

Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness and ability to safeguard classified information.

Conditions that could raise a security concern:

1. Unauthorized disclosure of classified information;
2. Violations that are deliberate or multiple or due to negligence.

Conditions that could mitigate security concerns included actions that:

None.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

None.

Guideline B (Foreign Influence)

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or he may be bound by affection, influence, or obligation are: (1) not citizens of the United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Condition that could raise a security concern:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Conditions that could mitigate security concerns:

None.

Guideline F (Financial Considerations)

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Conditions that could raise a security concern:

None.

Condition that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern:

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure;

5. A pattern of dishonesty or rule violations; to include violation of any written or recorded agreement made between the individual and the agency.

Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of

variables known as the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

The Government must make out a case under Guideline K, (Security Violations), Guideline J (Criminal Conduct), Guideline B (Foreign Influence), Guideline F (Financial Considerations) and, Guideline E (Personal Conduct), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates a disregard for security policies and procedure, or who engages in a pattern of rule violations, may be prone to provide information or make decisions that are harmful to the interests of the United States.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's security

violations, misuse of information technology systems and his personal conduct have a direct and negative impact on his suitability for access to classified information.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

There is no reasonable excuse for the Applicant's history of repeated security violations. His actions were deliberate and with blatant disregard for the rules and regulations for the proper safeguarding of classified information. The safety of such information is the ultimate goal of national security. The Government cannot continue to place its trust in one who repeatedly violates that trust by circumventing security regulations.

From 1997 through 2000, the Applicant knowingly failed to follow company security policy and procedure and violated the provisions of the NISPOM when, by virtue of his employment, position and contract, he removed, stored and disclosed classified information of the United States. The classified information, specifically being a viewgraph classified at the Secret level was knowingly and without authorization removed and disclosed to unauthorized individuals. These violations were so negligent and serious that they rose to the level of criminal and were prosecuted by the United States Attorney. The Applicant was charged and convicted of one count of Unauthorized Removal and Retention of a Classified Document in violation of Title 18, United States Code, Section 1924(a). The Applicant's repeated security violations establish a pattern of rule violations over an extended period of time that shows extremely poor judgment. Under Guideline K, (Security Violations), Disqualifying Conditions *(1) unauthorized disclosure of classified information* and *(2) violations that are deliberate or multiple or due to negligence* apply. None of the mitigating conditions are applicable. The Applicant's conduct was not inadvertent, unintentional, isolated or infrequent nor was it due to improper or inadequate training. Accordingly, I find against the Applicant under this guideline.

Under Guideline J, (Criminal Conduct), Disqualifying Conditions *(1) any criminal conduct, regardless of whether the person was formally charged* and *(2) a single serious crime or multiple lesser offenses* apply. None of the mitigating conditions are applicable. Under the particular facts of this case, the Applicant's criminal conduct is considered recent because of the severity of the offenses. The Applicant engaged in three distinct criminal acts, namely (1) either the intentional or negligent removal of a classified document, (2) failure to notify the proper authorities upon learning of its unauthorized removal, and then (3) intentionally disclosing the classified document to unauthorized persons during his interview. This course of conduct was not isolated or infrequent. Based upon the egregiousness of these acts, I cannot find that there is clear evidence of successful rehabilitation at this time. Accordingly, I find against the Applicant under this guideline.

Under Guideline E, (Personal Conduct), Disqualifying Conditions *(4) personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure* and *(5) a pattern of dishonesty or rule violations; to include violation of any written or recorded agreement made between the individual and the agency* apply. None of the mitigating conditions are applicable. For the same reasons outlined in the paragraph above, I find against the Applicant under this guideline.

The Applicant's ten year old daughter, and sister, are citizens of and reside in South Korea. His mother also now lives in South Korea. The Applicant has close and continuing ties of affection and obligation, with his family there. He provides monthly financial support to his daughter and maintains regular and continuing contact with his foreign family members in South Korea. He travels there on at least an annual basis and plans to continue to do so. Under Guideline B, (Foreign Influence), Disqualifying Condition *(1) an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country* applies. Based upon these

circumstances, I cannot make a determination that his immediate

family members, including his daughter, sister and mother would not constitute an unacceptable security risk. None of the mitigating factors are applicable. Accordingly, I find against the Applicant under this guideline.

I find that he is sufficiently rehabilitated and reformed with regard to the gambling addiction that may have impacted his financial affairs and personal conduct. Under Guideline F, (Financial Considerations), none of the Disqualifying Conditions apply. Accordingly, I find for the Applicant under this guideline.

In addition to the disqualifying and mitigating conditions in this case, I have also considered the "whole person" concept. The Applicant is a mature educated individual who has used some very poor judgment in the past. I have considered the nature, extent and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, his age and maturity at the time of the conduct, the voluntariness of participation, the presence or absence of rehabilitation and other pertinent behavioral changes, the motivation of the conduct, the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. I have considered each of these factors individually and collectively in reaching my overall conclusion.

Under the particular facts of this case, the Applicant has not demonstrated that he is trustworthy, and does not meet the eligibility requirements for access to classified information at this time. He may be eligible some time in the future. Accordingly, I find against the Applicant under Guideline K (Security Violations), Guideline J (Criminal Conduct), Guideline E (Personal Conduct) and Guideline B (Foreign Influence).

In reaching my decision, I have carefully considered the Applicant's testimony, the documentary evidence and the applicable disqualifying and mitigating conditions of 5200.2-R. On balance, I conclude that the Applicant's mitigating evidence is insufficient to overcome the evidence of unreliability and unsuitability for a security clearance. Therefore, it is not clearly consistent with the interests of national security to grant him a security clearance. Accordingly, the evidence supports findings against the Applicant's to the factual and conclusionary allegations of the LON as set forth below.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his security violations, criminal conduct, poor personal conduct and foreign influence. The Applicant has not met the mitigating conditions of Guidelines K, J, E and B of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines K, J, E and B. Guideline F is found for the Applicant.

FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant

1.c.: Against the Applicant

1.d.: Against the Applicant

Paragraph 2: Against the Applicant.

Subparas. 2.a.: Against the Applicant

Paragraph 3: Against the Applicant.

Subparas. 3.a.: Against the Applicant

3.b.: Against the Applicant

Paragraph 4: For the Applicant.

Subparas. 4.a.: For the Applicant

Paragraph 5: Against the Applicant.

Subparas. 5.a.: Against the Applicant

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge